Congress of the United States

House of Representatives

Washington, D.C. 20515

June 23, 2004

The Honorable Tom Ridge
Secretary of Homeland Security
Department of Homeland Security
Washington, DC 20528

Dear Mr. Secretary:

On May 11, 2004, Representatives Sensenbrenner, Cox, and Davis wrote you to protest the slow pace at which the Homeland Security Department was granting liability protection to sellers of anti-terrorism technologies under the Support Anti-Terrorism by Fostering Effective Technologies Act of 2002 (SAFETY Act). For example, the letter urges you to extend liability protections to technologies that are already insurable; limit the Department's review of technologies for utility and safety, deferring to the judgment of buyers; and extend the law's liability limits liberally and unconditionally. Although the Department has been slow to implement the SAFETY Act and process applications, the rubberstamp approach they recommend is contrary to the law and the interest of public safety.

Background

As you know, we had serious concerns about the SAFETY Act when it was under consideration in Congress. We argued that its sweeping liability protections went too far, exposing the public to unsafe and ineffective products and substantially stripping citizens of legal recourse to the courts, even if they were injured as a result of intentional corporate misconduct. We believed that an alternative mechanism, proposed by Rep. Jim Turner and based on indemnification authority in place since the Eisenhower Administration, would result in faster deployment of effective technologies, deter egregious misconduct by sellers, and permit appropriate compensation for injuries.

Despite these concerns, however, supporters of the SAFETY Act contended that these extraordinary protections were necessary because sellers of innovative anti-terrorism technologies could not obtain liability insurance and, fearful of lawsuits, were choosing not to bring their products to market.[1] The proponents pointed out that under the proposed scheme, sellers needed to insure themselves to the limits of reasonably available and reasonably priced

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[1] 148 Cong. Rec. H5832 (July 26, 2002) (Statement of Rep. J. C. Watts) ("The fatally flawed tort system in America and the unbounded threat of liability are blocking the deployment of anti-terrorism technologies that can protect the American people.")

insurance.[2] Supporters of the SAFETY Act also pointed to the required approval process to protect the public against unsafe products. Rep. Bob Goodlatte summarized this view during floor debate, stating that "[t]he provisions in the bill help ensure that effective antiterrorism technologies that meet very stringent safety and effectiveness requirements are deployed and require that companies selling such devices obtain the maximum amount of liability insurance possible."[3]

The House rejected the Turner amendment by a vote of 215-214, and Congress instead passed the SAFETY Act. It is difficult to conceive of a scheme of liability protection more comprehensive or more favorable to the interests of companies marketing products as anti-terrorism technologies. Under the law, you have virtually unlimited discretion to designate a broad array of goods, services, and intellectual property as "qualified anti-terrorism technologies." Once a seller receives this designation, it automatically enjoys protection from lawsuits in any state court, a cap on liability to the limits of "reasonably available" insurance coverage, a bar on joint and several liability for noneconomic damages, total protection from punitive damages, and a reduction of any injured plaintiff's recovery by any amounts the plaintiff received from insurance benefits or other "collateral sources." If this were not enough, a seller can obtain certification to receive additional protection under an expanded "government contractor defense," which affords absolute immunity against injury claims resulting from design defects or a seller's failure to warn.[4]

Favoring Sales Over Public Safety

In their May 11 letter, Reps. Sensenbrenner, Cox, and Davis take the view that the Department should go even further to facilitate the sales of products characterized as anti-terrorism technologies. While we agree that the Department's review should be streamlined and less burdensome, we disagree that the SAFETY Act's liability protections should extend beyond companies unable to obtain insurance; that the Department should defer to the judgment of buyers; and that it should extend liability protections liberally and unconditionally, even if the seller has made modifications that significantly affect safety and effectiveness. Such an approach would not only expose the public to unsafe and ineffective products without meaningful legal recourse, but it is contrary to the clear meaning of the SAFETY Act.

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[2] H.R. 5005, Homeland Security Act of 2002, § 864(a)(3); *see* 148 Cong. Rec. H5833 (July 26. 2002) (Statement of Rep. Tom Davis pointing out that sellers needed to acquire insurance to receive the protections of the Act).

[3] 148 Cong. Rec. H5834 (July 26, 2002).

[4] On top of all of these protections, the Homeland Security Department may also grant indemnification to sellers under Public Law 85-804. *See* Executive Order 13286 (Feb. 28, 2003); *see also Regulations Implementing the Support Anti-Terrorism by Fostering Effective Technologies Act of 2002 (the SAFETY Act)*, 68 Fed. Reg. 59684 (Oct. 16, 2003).

In their letter, Reps. Sensenbrenner, Cox, and Davis write that "we want to unequivocally dispel any lingering notion that the SAFETY Act is to be narrowly construed and applied, or is somehow intended to address only those limited situations in which technology would not otherwise be insurable." They argue, further, that the Department should not request historical insurance information or financial information that could be relevant to a seller's pricing decisions. This approach is fundamentally inconsistent with the statutory language, which limits the seller's responsibility to obtain liability insurance to "the maximum amount of liability insurance reasonably available from private sources on the world market at prices and terms that will not unreasonably distort the sales price of Seller's anti-terrorism technologies."[5] The Homeland Security Department could not possibly implement this provision without evaluating a seller's potential risk exposure, the availability and price of adequate coverage, and the financial impact of such coverage on the price of the product. While a seller's ability to obtain limited insurance coverage might be useful as part of the overall inquiry, the Department must have access to all of the relevant insurance and financial information.

Reps. Sensenbrenner, Cox, and Davis also argue that the Department should minimize its review of safety and utility, construe the SAFETY Act to facilitate transactions, and defer to the judgment of buyers. This too is contrary to the SAFETY Act. Although you have broad discretion to grant liability protections, the law is clear that you must review products for utility and safety prior to designating them as qualified anti-terrorism technologies or certifying them for immunity under the government contractor defense. Before making a designation, you are required to evaluate (1) prior U.S. government use or substantial utility and effectiveness, (2) availability of the technology for immediate deployment, (3) the existence of extraordinarily large or extraordinarily unquantifiable potential liability, (4) substantial likelihood that the technology will not be deployed without the liability protections of the act, (5) the magnitude of risk to the public if the technology is not deployed, (6) evaluation of all scientific studies that can be feasibly conducted to assess capability of the technology, and (7) the effectiveness of the technology in defending against acts of terrorism.[6] While you have flexibility to accord varying degrees of weight to these factors in your final decision, that statute requires you to examine all of these criteria to the extent they apply to the proposed anti-terrorism technology.

The SAFETY Act is even more explicit in requiring a careful review of technologies under consideration for immunity under the government contractor defense. You are "exclusively responsible for review and approval" of these technologies.[7] Upon submission for approval, you are required to "conduct a comprehensive review of the design of such technology

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[5] 6 U.S.C. § 443 (a)(3).

[6] 6 U.S.C. § 441.

[7] *Id.* at § 442(d)(2).

and determine whether it will perform as intended, conforms to the Seller's specifications, and is safe for use as intended."[8]

In addition, Reps. Sensenbrenner, Cox, and Davis are wrong when they urge the Department to rewrite the language of its Interim Rule 25.5(i), which states that SAFETY Act protections will terminate automatically if technology is changed in a manner that "could significantly reduce the safety or effectiveness of the technology." Any interpretation of the SAFETY Act that allows a seller to obtain approval for one product, but permits modifications that significantly reduce the approved product's safety and effectiveness, would render the review process meaningless.

Instead of expanding the liability protections of the SAFETY Act, the Department should address shortcomings in the application process that have been identified by many companies. For instance, the Department should immediately clarify how the information it is provided by applicants will be secured, who will be reviewing the materials, and what specific information is required for the Department to conduct its review.

Conclusion

Congress intended the SAFETY Act to extend liability protection only when the terrorism risk insurance market prevented the deployment of safe and effective anti-terrorism technologies. We recognize that applying this standard is difficult, yet it is the statutory framework selected by the Congress. If the legislatively created standard is causing delays in the deployment of technology needed to protect the security of the American people, Congress needs to be told. Congress has the responsibility of ensuring that the Department has the proper legal authorities and tools for providing for the protection America. Consequently, any demand made upon the Department to disregard the duties and responsibilities of the SAFETY Act are misplaced. Before you use the SAFETY Act to limit the reach of our civil justice system, we trust that you will take every reasonable measure to assure the safety and effectiveness of qualified anti-terrorism technologies.

Sincerely,

Henry A. Waxman
Ranking Minority Member
Committee on Government Reform

Jim Turner
Ranking Minority Member
Select Committee on Homeland Security

John Conyers, Jr.
Ranking Minority Member
Committee on the Judiciary

[8] *Id.*